

MT LEGISLATIVE HISTORY

Chapter 530 1983

Bill (H) 357 S _____

Original bill & hist. ☒ C

H. Committee on Judiciary

S. Committee on Judiciary

Hearing Date(s) Feb 02 ☒ C

Hearing Date(s) Mar 17 ☒ C

Feb 04 ☒ C

Mar 24 ☒ C

_____ ☐ C

_____ ☐ C

_____ ☐ C

_____ ☐ C

Date Out Feb 05 ☒ C

Mar 24 ☒ C

Did this bill originate in an interim committee? ☐ Yes ☐ No

Committee _____

Report _____

HOUSE BILL NO. 357

INTRODUCED BY DONALDSON,
MAZUREK, METCALF, ERNST

IN THE HOUSE

January 19, 1983	Introduced and referred to Committee on Judiciary.
February 8, 1983	Committee recommend bill do pass as amended. Report adopted.
February 9, 1983	Bill printed and placed on members' desks.
February 10, 1983	Second reading, do pass.
February 11, 1983	Considered correctly engrossed.
February 12, 1983	Third reading, passed. Transmitted to Senate.

IN THE SENATE

February 12, 1983	Introduced and referred to Committee on Public Health, Welfare and Safety.
March 3, 1983	Rereferred to Committee on Judiciary.
March 24, 1983	Committee recommend bill be concurrent in as amended. Report adopted.
March 26, 1983	Second reading, concurred in.
March 28, 1983	Third reading, concurred in. Ayes, 47; Noes, 0.

IN THE HOUSE

March 28, 1983

Returned to House with
amendments.

April 1, 1983

Second reading, pass
consideration.

April 4, 1983

Second reading, amendments
concurred in.

April 5, 1983

Third reading, amendments
concurred in. Ayes, 98;
Nees, 0.

Sent to enrolling.

Reported correctly enrolled.

1 House BILL NO. 357
 2 INTRODUCED BY Conditon / Mezunch Metcalf
 3 Conditon
 4 A BILL FOR AN ACT ENTITLED: "AN ACT TO REVISE THE LAWS
 5 RELATING TO IMMUNIZATION AND INDEMNIFICATION OF GOVERNMENTAL
 6 EMPLOYEES; AMENDING SECTION 2-9-305, MCA; AND PROVIDING AN
 7 EFFECTIVE DATE."
 8
 9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
 10 Section 1. Section 2-9-305, MCA, is amended to read:
 11 "2-9-305. Governmental entity to be joined as
 12 defendant -- immunization, defense, and indemnification of
 13 employees. (1) It is the purpose of this section to provide
 14 for the immunization, defense, and indemnification of public
 15 officers and employees civilly sued for their actions, other
 16 ~~than intentional tort or felonious acts~~, taken within the
 17 course and scope of their employment.
 18 (2) In ~~an~~ any noncriminal action for damages brought
 19 against any employee of a state, county, city, town, or
 20 other governmental entity for a negligent act, error, or
 21 omission, including alleged violations of civil rights
 22 pursuant to 42 U.S.C. 1983, or other actionable conduct of
 23 the employee committed while acting within the course and
 24 scope of ~~his~~ the employee's office or employment, the
 25 governmental entity employer, except as provided in

1 subsection (6) shall:
 2 (a) be made a party defendant to the action; and
 3 (b) defend the action on behalf of the employee and
 4 indemnify the employee.
 5 ~~(3) Recovery against a governmental entity under the~~
 6 ~~provisions of parts 1 through 3 of this chapter shall~~
 7 ~~constitute a complete bar to any action or recovery of~~
 8 ~~damages by the claimant by reason of the same subject~~
 9 ~~matter against the employee whose negligence or wrongful~~
 10 ~~act, error, or omission or other actionable conduct gave~~
 11 ~~rise to the claim in any such action against a governmental~~
 12 ~~entity the employee whose conduct gave rise to the suit~~
 13 ~~shall be immune from suit by reasons of the same subject~~
 14 ~~matter if the governmental entity acknowledges or is bound~~
 15 ~~by a judicial determination that the conduct upon which the~~
 16 ~~claim is brought arises out of the course and scope of such~~
 17 ~~employee's employment unless the claim is based upon an~~
 18 ~~intentional tort or felonious act of the employee Upon~~
 19 receiving service of a summons and complaint in a
 20 noncriminal action against him, the employee shall give
 21 written notice to his supervisor requesting that a defense
 22 to the action be provided by the governmental entity
 23 employer. Except as provided in subsection (6), the
 24 employer shall offer a defense to the action on behalf of
 25 the employee. The defense may consist of a defense provided

1 directly by the employer. The employer shall notify the
 2 employee, within 15 days after receipt of notice, whether a
 3 direct defense will be provided. If the employer refuses or
 4 is unable to provide a direct defense, the defendant
 5 employee may retain other counsel. Except as provided in
 6 subsection (6), the employer shall pay all expenses relating
 7 to the retained defense and pay any judgment for damages
 8 entered in the action that may be otherwise payable under
 9 this section.

10 (4) In any noncriminal action for damages in which a
 11 governmental entity employee is a party defendant, the
 12 employee shall be indemnified by the governmental entity
 13 employer for any money judgments or legal expenses,
 14 including attorney fees either incurred by the employee or
 15 awarded to the claimant, or both, to which he the employee
 16 may be subject as a result of the suit unless the conduct
 17 upon which the claim is brought did not arise out of the
 18 course and scope of his employment or is an intentional tort
 19 or felonious act of the employee or falls within the
 20 exclusions provided in subsection (6).

21 (5) Recovery against a governmental entity under the
 22 provisions of parts 1 through 3 of this chapter constitutes
 23 a complete bar to any action or recovery of damages by the
 24 claimant, by reason of the same subject matter, against the
 25 employee whose negligence or wrongful act, error, or

1 omission or other actionable conduct gave rise to the claim.
 2 In any such action against a governmental entity, the
 3 employee whose conduct gave rise to the suit is immune from
 4 civil suit by reasons of the same subject matter if the
 5 governmental entity acknowledges or is bound by a judicial
 6 determination that the conduct upon which the claim is
 7 brought arises out of the course and scope of the employee's
 8 employment, unless the claim constitutes an exclusion
 9 provided in subsection (6).

10 (6) In a noncriminal action for damages in which a
 11 governmental entity employee is a party defendant, the
 12 employee may not be defended or indemnified by the employer
 13 for any money judgments or legal expenses, including
 14 attorney fees, to which the employee may be subject as a
 15 result of the suit if a judicial determination is made that:
 16 (a) the conduct upon which the claim is based does not
 17 arise out of the course and scope of the employee's
 18 employment;

19 (b) the conduct of the employee constitutes a criminal
 20 offense as defined in Title 45, chapters 4 through 7; or

21 (c) the employee failed or refused to cooperate
 22 reasonably in the defense of the case.

23 (7) If there is a dispute as to whether the exclusions
 24 of subsection (6) apply and the governmental entity employer
 25 concludes it should clarify its obligation to the employee

1 arising under this section by commencing a declaratory
2 judgment action or other legal action, the employer is
3 obligated to provide a defense or assume the cost of the
4 defense of the employee until a final judgment is rendered
5 in such action holding that the employer had no obligation
6 to defend the employee."

7 NEW SECTION. Section 2. Effective date. This act is
8 effective July 1, 1983.

-End-

STATE OF MONTANA

REQUEST NO. 197-83

FISCAL NOTE

Form BD-15

compliance with a written request received January 21, , 19 83 , there is hereby submitted a Fiscal Note
House Bill 357 pursuant to Title 5, Chapter 4, Part 2 of the Montana Code Annotated (MCA).

Background information used in developing this Fiscal Note is available from the Office of Budget and Program Planning, to members
of the Legislature upon request.

DESCRIPTION OF PROPOSED LEGISLATION:

House Bill 357 provides for the defense of governmental employees involved in civil
suits for damages as a result of actions while within their scope of employment.

ASSUMPTIONS:

- 1) In the past five years, 142 civil rights cases have been filed against the
officers of state government and a total of \$328,641 in judgments and settlements
have been rendered against the defendants.
- 2) It is estimated that about 30 cases per year will be filed, and judgments plus
legal expenses averaging \$5,000 per claim will be incurred.
- 3) These expenses can be absorbed by the self-insurance fund with no immediate
increase in billings to agencies.

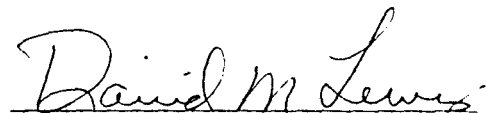
FISCAL IMPACT:

Expenditures from the self-insurance fund will increase by about \$215,000 per year,
with no immediate increase in billings to state agencies.

LONG-RANGE IMPACTS:

Ultimately, billings to state agencies may have to be increased.

FISCAL NOTE 7:FF/1



BUDGET DIRECTOR

Office of Budget and Program Planning

Date: 1-26-83

STATUS SHEET

JUDICIARY

COMMITTEE

48 Legislature

Bill No.	Subject Matter	Date In	Sponsor	Hearing Date	Committee Action	Date Out
350	Specifying the time period during which Board of Pardons shall investigate a prisoner to determine his suitability for parole.	1/19/83	Rep. Hammond	1/31/83	Do Pass	1/31/83
355	Revising and clarify the laws relating to evidence.	1/19/83	Rep. Sands	2/2/83	Do Pass	2/4/83
357	Revise the laws relating to immunization and indemnification of governmental employees.	1/19/83	Rep. Donaldson	2/2/83	Do Pass, As Amended	2/5/83
358	Prohibiting discrimination on the basis of sex or marital status in the issuance or operation of insurance policies and retirement plans.	1/19/83	Rep. J. Brown	1/28/83	Do Pass, As Amended	2/8/83
362	Providing a voluntarily induced intox. or drugged condition may not be considered an impairment to a defendant's mental capacity.	1/19/83	Rep. Sands	1/31/83	Do Pass	2/2/83
368	Expanding the scope of appeal by the State in crim. cases by allowing interlocutory appeals on controlling questions of law.	1/19/83	Rep. Sands	1/27/83	Do Not Pass	1/27/83

HOUSE JUDICIARY COMMITTEE
FORTY-EIGHTH LEGISLATIVE SESSION
1983 - 1984

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* * * * *
*
* DAVE BROWN, CHAIRMAN
* KELLY ADDY, VICE-CHAIRMAN
* TONI BERGENE
* JAN BROWN
* AUBYN CURTISS
* FRITZ DAILY
* PAULA DARKO
* RALPH EUDAILY
* CAROL FARRIS
* TOM HANNAH
* DENNIS IVERSON
* JAMES JENSEN
* ROLAND KENNERLY
* KERRY KEYSER
* JACK RAMIREZ
* TED SCHYE
* CARL SEIFERT
* GARY SPAETH
* DENNIS VELEBER
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Brenda Desmond, Researcher Alice Omang, Secretary
Maureen Richardson, Secretary

Minutes of the Judiciary Committee
February 2, 1983

The meeting of the House Judiciary Committee was called to order by Chariman Dave Brown. All members were present except REPRESENTATIVE FARRIS who was excused. Brenda Desmond, Legislative Council, was present.

HOUSE BILL 417

This bill updates the list of controlled substances contained in the state law to conform with the list of controlled substances under federal law, explained the sponsor, REPRESENTATIVE METCALF. The Board of Pharmacists has requested the bill. The federal list is published yearly, but it is felt the law should also be updated.

WARREN AMOLE, Board of Pharmacists supported the bill with EXHIBIT A. AMOLF recommended the committee adopt the amendments as proposed in his testimony to change the clerical typing errors of two of the drugs.

There were no further proponents.

There were no opponents.

REPRESENTATIVE METCALF, in closing, recommended the amendments be adopted.

REPRESENTATIVE ADDY asked how the list is developed. AMOLE replied it is taken from the Code of Federal Regulations. The Federal Food and Drug Administration sets up the schedule on the basis of the potential for abuse of the drug.

The hearing on the bill closed.

HOUSE BILL 357

REPRESENTATIVE DONALDSON, sponsor, stated House Bill 357 would revise the laws relating to immunization and indemnification of governmental employees. There is an ever increasing number of civil rights actions brought under federal law against employees of the state and local governments.

REPRESENTATIVE DONALDSON read EXHIBIT B, a letter from Mike Young Administrator of the Insurance and Legal Division of the Department of Administration.

SENATOR JOE MAZUREK, Senate District 16, was in favor of the proposed legislation. SENATOR MAZUREK stated he worked on the bill with the sponsor and the Department of Administration. He felt there are some mechanical problems with the bill; however, with the amendments that will be proposed, particularly those to be proposed by the City of Missoula and the Department of Administration, some of these problems will be worked out.

MIKE YOUNG, Department of Administration, stated his division's purpose is to defend all state officers and employees. The bill is a combined effort of the state and other agencies and local governments.

In the post civil war years after the 14th amendment was amended to the constitution the United States, Congress enacted a number of civil rights statutes and then enacted nine in the 1960's. 28 U.S.C. 1983 was originally designed by Congress to be used to go after the typical southern sheriff who used his office to deny people their civil rights. The federal civil rights statutes were rarely used for many years. But then a number of claims were filed in the 1960's.

YOUNG stated his office must go through all the complaints. All officers and employees are provided to defense for the civil rights actions because the department does not know where the litigation will end up. Today almost half of the claims filed against government employees contain some sort of civil rights claim.

As a consequence, a number of people have received warning letters at the outset of litigation that state if the defendant is found guilty of the civil rights violation, the state will not be liable and the guilty party will have to assume the responsibility.

There was a survey taken in the summer of 1982. The state agencies were asked to submit a summary of civil rights claims for the past five years. Approximately 142 claims have been filed during that time. Since then, a number of others have been filed. The Department of Institutions was recently sued in Missoula concerning the group home there. YOUNG stated he has also been sued.

This type of action is a harrassment to the state employees. The basic idea of the bill is to require government entities to provide a defense for employees except when the employees' actions fall within the exclusions of subsection (6). The bill also requires the government entity to indemnify the employee. Subsection (6) attempts to take away the indemnity right. There were a number of problems with this. This would exclude any defense for conduct that is also a criminal offense. YOUNG stated he was not entirely satisfied with that approach because it requires trying to prove a criminal burden in a civil case.

YOUNG offered EXHIBIT C, amendments to the bill. Line 2 of the bill on page 2 should be struck because a state is not a person. If this were kept in the bill it would be a violation to the 11th amendment of the U.S. Constitution.

YOUNG stated there is a morale problem with state employees because of the lengthy litigation process. This bill would give

the state more control of the conduct and settlement of the litigation. The bill would be financed through the state fund.

YOUNG stated in attempting to balance the act between the rights of the employee and the rights of the employer sometimes intended actions have unintended results.

CHUCK O'REILLY, Montana Sheriffs & Peace Officers, was in favor of the bill. He has been involved in jail liability suits a number of times. He has been sued for from \$20,000 up to 1 1/2 million dollars. His jailors, who earn \$850 a month gross, have also been sued. They could not afford payment if a judgement were entered against them.

BILL WARE, Montana Chiefs of Police Association, supported the bill. Many civil suits have been filed against him and the police officers. Some officers that have been sued have had to hire an attorney because the alleged act was within the scope of their employment.

NICK ROTERING, Department of Institutions, stated he has tried over 100 of this type of lawsuit. Prior to June 20, 1982, he had not lost such a case. However, that situation has changed since then. Attorneys are now getting involved for the inmates because if the attorneys can obtain any relief for the inmates they are entitled to attorneys fees. It is up to the Department whether to defend the state in these matters.

JIM GLOSSER, Administrator of the Animal Health Division of the Department of Livestock, showed support of the bill by reading testimony from EXHIBIT D.

GLENN DRAKE, representing the Montana Public Employees Association and the American Insurance Association, was in favor of the bill. Since insurance companies often insure counties, this bill will make it clarify issues should the counties get sued.

MARY FAY, Montana Correctional Association, was in favor of the bill. The Association includes all correctional employees, juvenile and adult probation officers, the Board of Pardons, Board of Crime Control among others.

The Association supports the proposal because people in the correctional field are vulnerable to these types of lawsuits.

JEREMIAH JOHNSON, Montana Probation Officers Association, supported the bill. JOHNSON read a letter from the Missoula City Attorney, Jim Nugent supporting the bill. Amendments were also included as part of EXHIBIT E.

MARC RACICOT supported the bill.

EXHIBIT F, a letter from Robert L. Deschamps, III, was submitted in favor of the bill.

There were no further proponents.

There were no opponents.

In closing, REPRESENTATIVE DONALDSON stated that the Department of Administrations is threatened by lawsuits almost on a weekly basis. He stated he was in favor of the amendments proposed.

REPRESENTATIVE KEYSER noted \$215,000 would come out of the state's insurance fund. What year will the different agencies be billed for this and when will the fund no longer cover this? YOUNG stated the actuary feels the fund is solid for the next five years.

REPRESENTATIVE JENSEN asked GLOSSER if a judgement was ruled against him. GLOSSER replied yes, a judgement of \$275,000 was ruled in favor of the other party. That case is currently being appealed. The flurry of threats of lawsuits has increased since that time.

REPRESENTATIVE ADDY was concerned with the wording "for damages". SENATOR MAZUREK replied damages include civil actions for personal injury and for property damage.

ROTHERING noted a decision from the United States Supreme Court states that under present federal law a person cannot file property damage claims against state officials. Instead, an action under the state tort claims act must be filed.

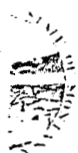
REPRESENTATIVE ADDY thought the bill as amended would shift the burden from the employer to the plaintiff. JOHNSON responded that if an action is filed because an employee has disobeyed a definite departmental policy, the amendments would make sure that type of person would be excluded from coverage. It would only take one bad employee to put the government office into a position that they would have to defend his actions when in reality they were opposed to his actions.

The hearing on the bill closed.

HOUSE BILL 415

REPRESENTATIVE DAILY, sponsor, stated this bill will allow a municipal court judge and his law partners to practice law before any court of this state except the court of that municipal judge.

REPRESENTATIVE DAILY noted the bill is being sponsored at the request of one of his constituents.



STATE OF MONTANA
DEPARTMENT OF ADMINISTRATION

Memorandum

TED SCHWINDEN
GOVERNOR

HB 357
Exhibit B
2/2/83

TO: REPRESENTATIVE GENE DONALDSON, DISTRICT 29

FROM: MIKE YOUNG, ADMINISTRATOR
INSURANCE AND LEGAL DIVISION

DATE: JANUARY 28, 1985

SUBJECT: H.B. 357 - LIABILITY OF GOVERNMENT EMPLOYEES

THE FOLLOWING IS A SUMMARY OF H.B. 357 INCLUDING BOTH PRO'S AND CON'S:

THE PRIMARY IMPETUS FOR THIS BILL IS THE EVER INCREASING NUMBER OF CIVIL RIGHTS ACTIONS BROUGHT UNDER FEDERAL LAW AGAINST EMPLOYEES OF STATE AND LOCAL GOVERNMENTS. ALTHOUGH MANY OF THESE ACTIONS COULD BE PRESENTED AS NEGLIGENT OR WRONGFUL CONDUCT UNDER THE STATE TORT CLAIMS ACT, SUCH CLAIMS ARE FILED UNDER FEDERAL LAW TO IMPOSE PERSONAL LIABILITY UPON OFFICERS AND EMPLOYEES. INDEED, MANY CLAIMS ALLEGE BOTH TORTIOUS AND CIVIL RIGHTS VIOLATIONS IN ORDER TO IMPOSE LIABILITY UPON BOTH THE GOVERNMENT AND THE INDIVIDUAL.

UNDER CURRENT STATE LAW, SECTION 2-9-305, MCA, EMPLOYEES ARE IMMUNIZED AND INDEMNIFIED FOR ACTIONS THAT ARE NOT INTENTIONAL OR FELONIOUS, AND TAKEN WITHIN THE COURSE AND SCOPE OF EMPLOYMENT. THIS INDEMNITY PROVISION DOES NOT APPLY TO FEDERAL CIVIL RIGHTS LAWS. IN ADDITION, VIOLATIONS OF SUCH LAWS ARE DEEMED INTENTIONAL OR WILLFUL AND IN CERTAIN INSTANCES CAN BE CRIMINALLY PROSECUTED BY THE U.S. JUSTICE DEPARTMENT AND WOULD THEREFORE BE EXCLUDED FROM INDEMNITY UNDER STATE LAW.

AGAINST THIS BACKGROUND, YOU SHOULD NOTE THAT CIVIL RIGHTS ACTIONS UNDER FEDERAL LAW WERE RELATIVELY RARE UNTIL RECENT TIMES. HOWEVER, A SURVEY OF STATE AGENCIES IN JUNE OF LAST YEAR REQUESTING CLAIM AND SETTLEMENT DATES ON ALL CASES BROUGHT UNDER 42 USC 1983 DURING THE PAST FIVE YEARS INDICATED AN ALARMING TREND. OVER 142 CIVIL RIGHTS CLAIMS HAVE BEEN FILED AGAINST STATE OFFICERS AND EMPLOYEES IN THIS PERIOD WITH TOTAL SETTLEMENTS AND JUDGMENTS IN THE AMOUNT OF \$328,641. THIS AMOUNT DOES NOT INCLUDE ANCILLARY ITEMS SUCH AS DEFENSE COSTS AND ATTORNEYS FEES TO CLAIMANTS WHICH MAY BE AWARDED UNDER FEDERAL LAW. MOREOVER, SINCE THE RESULTS OF THE SURVEY WERE COMPILED, I AM AWARE OF TWO RECENT CIVIL RIGHTS CASES FILED AGAINST STATE OFFICIALS:

- (1) L.R. BRETZ V. DEPARTMENTS OF JUSTICE, INSTITUTIONS AND ADMINISTRATION, THIRTEENTH JUDICIAL DISTRICT (AMOUNT UNKNOWN);
- (2) ROE AND DOE V. KEITH COLBO, JOHN LAFAVER, CARROLL SOUTH, ET AL., NO. 56421, FOURTH JUDICIAL DISTRICT (SEEKING 1.5 MILLION).

SINCE ONLY FOUR OF THE 142 CLAIMS HAVE RESULTED IN PAYMENTS OF ANY KIND, IT CAN BE ASSUMED THAT THE BALANCE OF THESE CLAIMS ARE LARGELY UNFOUNDED.

H.B. 357 ATTEMPTS TO AMELIORATE BOTH EMPLOYEE AND AGENCY CONCERNS OVER THESE ISSUES IN TWO WAYS:

- (1) THE STANDARD OF INTENTIONAL BEHAVIOR QUALIFYING FOR INDEMNIFICATION HAS BEEN BROADENED FROM INTENTIONAL AND FELONIOUS CONDUCT TO ACTIONS CONSTITUTING AN OFFENSE UNDER THE CRIMINAL CODE; AND

(2) THE STATE MUST PROVIDE A DEFENSE FOR ALL CLAIMS INCLUDING CIVIL RIGHTS CLAIMS AGAINST EMPLOYEES UNLESS THE ACT CONSTITUTES AN OFFENSE UNDER THE CRIMINAL CODE.

UNDER BOTH CIRCUMSTANCES OUTLINED ABOVE, NOTHING IN THE BILL CHANGES THE BASIC REQUIREMENT IN EXISTING LAW THAT THE EMPLOYEE MUST BE ACTING IN THE COURSE AND SCOPE OF EMPLOYMENT TO BE DEFENDED OR INDEMNIFIED.

THE ANTICIPATED BENEFITS OF THIS LEGISLATION ARE AS FOLLOWS:

(1) EMPLOYEE - EMPLOYER CONFLICTS PENDING LITIGATION WOULD BE MINIMIZED, THUS ALLEVIATING MORALE PROBLEMS IN THE WORKPLACE.

(2) INDEMNITY BY THE STATE FOR DOUBLE DEFENSE COSTS AND ATTORNEYS FEES WOULD BE ELIMINATED IN MOST CASES EXCEPT FOR CLEAR CONFLICTS OF INTEREST BETWEEN THE AGENCIES AND THE EMPLOYEES.

(3) BY PROVIDING A JOINT DEFENSE IN ALL CASES FOR THE AGENCY AND THE EMPLOYEE, THE STATE CAN MAINTAIN BETTER CONTROL OVER THE LITIGATION AND SETTLEMENT OF CLAIMS WHICH SHOULD REDUCE DEFENSE COSTS.

(4) ALL INDEMNITY CLAIMS BY EMPLOYEES WILL BECOME COVERED BY THE DEPARTMENT OF ADMINISTRATION'S SELF-INSURANCE PLAN WHICH WILL DEFEND AND PAY ALL SUCH CLAIMS FROM THE SELF-INSURANCE FUND. THIS WILL AVOID SUPPLEMENTAL APPROPRIATION REQUESTS TO THE LEGISLATURE BY AGENCIES TO PAY JUDGMENTS ON BEHALF OF EMPLOYEES FOR CIVIL RIGHTS CLAIMS.

) OFFICERS, DIRECTORS AND EMPLOYEES OF STATE AND LOCAL GOVERNMENT WILL BE ABLE TO MAKE DECISIONS ON CONTROVERSIAL ISSUES WITHOUT FEAR OF PERSONAL REPRISAL IN THE CIVIL COURTS. THIS RATIONALE IS USED EXTENSIVELY BY THE COURTS TO JUSTIFY BOTH JUDICIAL IMMUNITY AND PROSECUTORIAL IMMUNITY FROM CIVIL LIABILITY.

5) NO EMPLOYEE WILL BE INDEMNIFIED FOR ACTS OUTSIDE THE COURSE AND SCOPE OF THEIR EMPLOYMENT OR FOR ANY ACTION THAT CONSTITUTES AN OFFENSE UNDER THE MONTANA CRIMINAL CODE.

THE ARGUMENTS AGAINST H.B. 357 WILL BE AS FOLLOWS:

1) CONGRESS AND THE FEDERAL COURTS HAVE IMPOSED PERSONAL LIABILITY ON PERSONS ACTING UNDER "COLOR OF LAW" IN THE VIOLATION OF CIVIL RIGHTS AS A MATTER OF PUBLIC POLICY WHICH SHOULD NOT BE DISTURBED BY THE STATE.

(2) CERTAIN PERSONS COMMITTING VIOLATIONS OF PERSONNEL REGULATIONS OR INSTRUCTIONS OF AN EMPLOYER IN CARRYING OUT THE DUTIES OF EMPLOYMENT MUST BE INDEMNIFIED BY THE STATE OR POLITICAL SUBDIVISION BECAUSE SUCH AN ACT DOES NOT CONSTITUTE A VIOLATION OF THE CRIMINAL CODE.

IN SUMMARY, THE POLICY QUESTION TO BE ANSWERED IS WHETHER THE RISK OF INDEMNIFYING A FEW EMPLOYEES ENGAGED IN NONCRIMINAL, WRONGFUL CONDUCT IS OUTWEIGHED BY THE BENEFIT OF DEFENDING NUMEROUS OFFICERS AND EMPLOYEES INDIVIDUALLY NAMED IN LITIGATION THAT IS

WITHOUT MERIT, AND WHICH INHIBITS THE ABILITY OF SUCH PERSONS TO EFFECTIVELY PERFORM THEIR DUTIES. THE LATTER APPEARS TO BE A MORE PRUDENT CHOICE.

IF YOU HAVE ANY QUESTIONS, PLEASE CALL.

JMY/CF

CC: SENATOR JOE MAZUREK, DISTRICT NO. 16

Young and its

① ② A

HB 357

Exhibit C

2/2/83

Amendments to H.B. 357 (introduced).

1. Page 2, line 1.
Strike: ":"
2. Page 2, line 2.
Strike: line 2 in its entirety
3. Page 2, line 3.
Strike: "(b)"
4. Page 2, line 4.
Following: "employee"
Insert: "as provided in subsection (4)"

TESTIMONY - James W. GLOSSER, D.V.M.
H. B. 357
SUPPORT OF BILL

HB 351
Exhibit D
2/2/83

1. My name is Jim Glosser. I am the Administrator of the Animal Health Division, Department of Livestock.
2. My testimony is based on experience as I am an administrator of the Department of Livestock and the State Veterinarian. It is a position of responsibility unlike some other administrator positions, as the Board of Livestock is unavailable to make decisions on a day-to-day basis. I am hired specifically to make decisions and am responsible for supervising licensed professionals. I also have full responsibility for some shared federal programs which deal daily with the granting of licenses and permits and the revocation of them. My decisions are many times of an emergency nature and of such importance that a firm decision must be made quickly in order to maintain position of control over program or people involved.
3. At present, I am a defendant in a case under appeal to the Federal Circuit Court. I was sued in Federal District Court for action taken in revocation of a permit and found liable in District Court for those actions and I am individually liable under Civil Rights law, subject to judgment in the sum of over \$275,000. The jury found that I acted beyond my scope of authority. Whether that is true or not, I acted in a manner compatible with predecessors in the same position, which I learned, in working for predecessors. I was taught to act in this manner, under similar circumstances and situations. Moreover I received no objections from counsel and ratifications of acts by superiors.

Point of Testimony

1. State employees are hired to make decisions and in some cases must make them in order to control a program or people under supervision or people under licensing program. This is especially true in administrative positions.
2. Sometimes these decisions must be made either immediately or in a short time frame to protect the public.
3. If employees must worry constantly of being individually liable for actions, taken within the scope of their authority, the time will come when few people will be willing to make a decision. These are not criminal actions, they are simply decisions which must be made quickly. If the problem is not taken care of, soon all decisions will be made either at a hearing or by the director of each department, if he is willing.

I urge the committee to render a do pass on HB 357.

HB 357
Exhibit E
2/2/83

TO: HOUSE JUDICIARY COMMITTEE
MONTANA STATE HOUSE OF REPRESENTATIVES
MONTANA STATE CAPITOL
HELENA, MONTANA 59620

FROM: JIM NUGENT, MISSOULA CITY ATTORNEY

RE: HOUSE BILL 357 - TO REVISE THE LAWS RELATING TO
IMMUNIZATION AND INDEMNIFICATION OF GOVERNMENT EMPLOYEES

DATE: FEBRUARY 1, 1983

Dear House Judiciary Members:

I am writing to you to express my support for House Bill 357 and the amendments proposed for House Bill 357 by Jerry Johnson, Chief Probation Officer with the Fourth Judicial District, Missoula County Courthouse, Missoula, Montana. House Bill 357 is an Act to revise the laws relating to immunization and indemnification of governmental employees. The objectives of this bill are commendable as they will help give governmental employees in Montana some peace of mind with respect to threats of lawsuit and actual lawsuits filed against them as governmental employees.

Some justifications for the enactment of a bill such as HB 357 are as follows:

- 1) It would be an injustice to the governmental officer or employee, particularly in the absence of bad faith, to be subjected to personal liability as a result of the exercise of his/her discretion in performing the legal obligations of his/her position.
- 2) The bill helps eliminate the danger that the threat of personal liability would deter the governmental officer or employee in his/her willingness to execute his/her office with the decisiveness and the judgment required for the public good.
- 3) The bill helps eliminate the fear that the threat of personal liability might deter citizens from holding public office or being employed as a governmental employee.

Mr. Johnson's proposed amendments are to (1) section 3, page 3, lines 3 and 4, elimination of the words "or is unable" (defendant employees would still be provided legal counsel); (2) adding two subsections to subsection (6) to identify two additional areas of employee conduct that should be identified as inappropriate conduct by the employee or officer; and (3) to add a new section that would allow the court to award attorney's fees to defendant governments and/or employees if a court finds that the plaintiff brought a frivolous suit or brought the suit with a malicious purpose or in bad faith.

I would urge your support for HB 357 and further urge your support for the amendments proposed by Mr. Johnson. Thank you for considering my comments.

Yours truly,


Jim Nugent, City Attorney

JN/jd

cc: Senator Joe Mazurek; Representative Gene Donaldson;
Representative Jerry Metcalf; Representative Gene Ernst;
Alec Hansen, Executive Director of the Montana League
of Cities and Towns.

MISSOULA COUNTY

OFFICE OF THE ATTORNEY
MISSOULA COUNTY COURTHOUSE
MISSOULA, MONTANA 59802
TELEPHONE: (406) 721-5700

HB 357
Exhibit F
2/2/83

ROBERT L. DESCHAMPS III
COUNTY ATTORNEY

February 1, 1983

Dave Brown
Chairman
House Judiciary Committee
State Capitol Bldg.
Helena, MT 59601

Re: House Bill 357

Dear Representative Brown and members of the Committee:

I offer this letter in support of HB 357 which revises the present statutes regarding the indemnification of governmental employees sued for acts arising from the performance of their duties.

The existing law appears to allow for employees to be indemnified for misdemeanors they commit while acting within the scope of their employment. This has caused some considerable difficulty in Missoula County. HB 357 removes this problem and makes it clear that employees are only to be indemnified when they are civilly sued, and that government employers are not required to defend or pay fines in criminal charges brought against their employees.

In addition, the bill clarifies that employees are protected when civil rights suits are filed against them in Federal Court. There is some question whether the existing law adequately does this, and again, in Missoula County, this has been a problem as we have been getting civil rights actions filed against employees at a rate of one every other week. To date, not a single case has been successful, but the costs of defending them are substantial and could easily

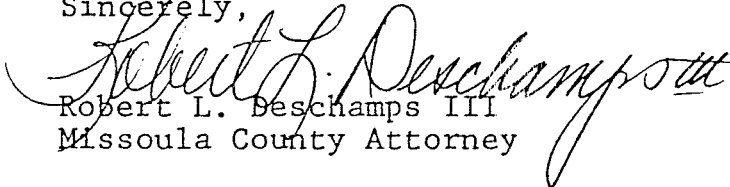
Dave Brown
Page 2

bankrupt individual employees if they had to pay for these defenses out of their own pocket.

Finally, the bill would change existing law by indemnifying employees for intentional torts. Some objections have been raised to this, and these objections are legitimate to the extent that a governmental employer should not be responsible for the ultra vires intentional torts of its employees, any more than it should be responsible for an employee's criminal acts. On the other hand, many lawsuits falsely allege intentional torts, and employees deserve protection against false claims of intentional torts every bit as much as against unfounded claims of negligence. The costs of defense will be the same, and it will be a hollow victory for any employee who goes broke successfully defending himself against an intentional tort claim for acts arising out of his employment.

I think that subsection (6) (a) (Page 4, lines 16-18), may cover the objections raised, in that unauthorized acts may not arise out of the course and scope of the employee's employment. However, some more positive language might be appropriate. I hope that an acceptable solution can be accomplished, as it is a badly needed and worthwhile piece of legislation.

Sincerely,


Robert L. Beschamps III
Missoula County Attorney

RLD:hr

1 RECOMMENDED CHANGES TO H.B. 357

2
3 Page 3, Lines 3 and 4, Delete or is unable

4 Page 4, Line 19, Change (b) to (c) and insert a new
5 (b) the conduct upon which the claim is based does arise out
6 of the course and scope of the employees' employment, but
7 fails to conform with established written rules, policies, or
8 standards of conduct of the employer; or

9 Page 4, Line 21, Change (c) to (d)

10 Page 4, Line 23, Insert (e) the employee compromised or
11 settled the claim without the consent of the government entity
12 employer.

13 Page 5, Line 7, Insert (8) If the plaintiff fails to prove
14 actionable conduct by the employer or employee and the Court
15 determines the allegations are frivolous, malicious or made in
16 bad faith, the Court may award attorney fees against the plain-
17 tiff and in favor of the defendant

Judiciary Committee
February 4, 1983
Page 13

HOUSE BILL 357

REPRESENTATIVE HANNAH made a motion that this bill DO PASS. The motion was seconded by REPRESENTATIVE IVERSON.

REPRESENTATIVE EUDAILY moved that the bill be amended on page 3, lines 3 and 4 by deleting "or is unable". The motion failed with REPRESENTATIVE EUDAILY AND REPRESENTATIVE JENSEN voting yes.

REPRESENTATIVE EUDAILY moved that the bill be amended on page 4, line 19, by changing (b) to (c) and insert a new (b). The motion failed with REPRESENTATIVE EUDAILY voting yes.

REPRESENTATIVE EUDAILY moved that the bill be amended on page 4, line 20, by striking the "or" and inserting "(c) the employee compromised or settled the claim without the consent of the government entity employer; or". The motion carried unanimously.

REPRESENTATIVE EUDAILY moved that the bill be amended on page 5, line 7, by inserting "(8) If the plaintiff fails to prove actionable conduct by the employer or employee and the Court determines the allegations are frivolous, malicious or made in bad faith, the Court may award attorney fees against the plaintiff and in favor of the defendant." The motion failed with REPRESENTATIVE KENNERLY, REPRESENTATIVE EUDAILY, REPRESENTATIVE BROWN AND REPRESENTATIVE SPAETH voting yes.

REPRESENTATIVE ADDY moved that on page 1, line 18, strike "for damages" and on page 3, line 10, strike "for damages" and on page 4, line 10, strike "for damages" and on page 3, lines 18 and 19, put back in "or is an intentional tort or felonious act of the employee". The motion was seconded by REPRESENTATIVE JENSEN.

REPRESENTATIVE ADDY made a substitute motion to just amend the bill by striking "for damages". The motion carried unanimously.

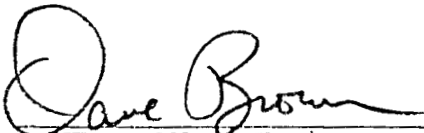
Judiciary Committee
February 4, 1983
Page 14

REPRESENTATIVE RAMIREZ made a motion that the bill be amended on page 4, line 8, by striking the language "unless the claim constitutes an exclusion provided in subsection (c)," REPRESENTATIVE KEYSER seconded the motion and it carried unanimously.

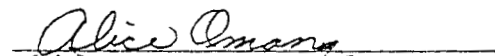
REPRESENTATIVE JENSEN made a motion that they strike the language on page 2, line 2, "be made a party defendant to the action, and". REPRESENTATIVE JENSEN seconded. The motion carried unanimously.

REPRESENTATIVE HANNAH moved that the bill DO PASS, AS AMENDED. REPRESENTATIVE RAMIREZ seconded and the motion carried unanimously.

The meeting adjourned at 11:32 a.m.



DAVE BROWN, Chairman



Alice Omang, Secretary

February 5, 1983

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 357

First reading copy (white color)

A BILL FOR AN ACT ENTITLED: "AN ACT TO REVISE THE LAWS RELATING
TO IMMUNISATION AND INDEMNIFICATION OF GOVERNMENTAL EMPLOYEES;
AMENDING SECTION 2-9-305, MCA; AND PROVIDING AN EFFECTIVE DATE."

Respectfully report as follows: That HOUSE Bill No. 357

BE AMENDED AS FOLLOWS:

1. Page 1, line 16.

Strike: "for damages"

2. Page 2, line 1.

Following: "shall"

Strike: ":(a) be made a party defendant to the action; and
(b)"

3. Page 3, line 10.

Strike: "for damages"

4. Page 4, line 10.

Strike: "for damages"

XXXXXX
XXXXXX
DO NOT

February 5, 1983

5. Page 4, line 20.

Strike: "or"

Insert: "(c) the employee compromised or settled the claim
without the consent of the government entity
employer; or"

Renumber subsequent subsection.

AND AS AMENDED

DO PASS

COMMITTEE ON Senate Judiciary

HOUSE BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO NOT <u>DATE</u>	DO NOT PASS <u>DATE</u>	DO PASS AS AMEND. <u>DATE</u>	BE CON- CURRED IN <u>DATE</u>	BE CONC. IN AS AMENDED <u>DATE</u>	BE NOT CON- CURRED IN <u>DATE</u>
251	1-25-83	2-7-83	2-7-83					2-7-83	
257	1-31-83	3-19-83	3-19-83				3-19-83		
265	2-2-83	3-4-83	3-4-83				3-4-83		
272	2-2-83	3-10-83	3-10-83				3-10-83		
307	2-7-83	2-9-83	2-10-83					2-10-83	
320	2-14-83	3-2-83	TABLED						
323	2-2-83	2-11-83	2-17-83						2-17-83
327	2-7-83	2-9-83	2-17-83						2-17-83
331	2-2-83	3-2-83	3-19-83					3-19-83	
350	2-7-83	2-9-83	2-9-83				2-9-83		
355	2-10-83	3-1-83	3-1-83				3-1-83		
357	3-3-83	3-17-83	3-24-83					3-24-83	
362	2-8-83	3-1-83	3-24-83					3-24-83	
369	2-3-83	2-10-83	2-10-83				2-10-83		
370	2-7-83	3-1-83	3-19-83					3-19-83	
376	2-11-83	3-4-83	3-19-83					3-19-83	

(Use Separate Sheet for Senate, House Bills, and Resolutions)

CONSIDERATION OF HOUSE BILL 357: Representative Donaldson, sponsor of this bill, testified that there is a real need for HB357 because of the ever-increasing amount of lawsuits being brought against employees of state and local governments. Representative Donaldson also stated that because of the increase in lawsuits for civil rights violations, state employees are not making decisions for fear of being sued.

PROPONENTS: Mr. Mike Young, representing the Montana Department of Administration, explained that the primary purpose of this bill is to expand the existing indemnity and defense rights of employees of the state. Mr. Young pointed out that the fiscal note of \$215,000 is illusive because last year out of the 142 civil rights cases filed, only 2 received judgments.

Sheriff Chuck O'Reilly, representing the Montana Sheriffs and Peace Officers Association, stated that many suits are filed against Sheriffs and jailers in particular. Mr. O'Reilly stated that 99.9 percent of these cases are merely a form of harrassment, but the officer still must pay his own defense costs from his own pocket. Mr. Jim Glosser, Administrator of the Animal Health Division, Department of Livestock of the State of Montana, submitted written testimony (see attached Exhibit "C"). Mr. Glosser's main concern was that an employee faced with an important decision which must be made quickly to protect the public, may hesitate because of his own personal liability.

Mr. Nick A. Rotering, Legal Counsel for the Montana Department of Institutions, testified that it is his belief that HB357 will allow employees to make professional decisions by alleviating some of the worry about lawsuits.

Ms. Mary Fay of the Montana Correctional Association, stated that the general public is now asking for more accountability from persons employed by agencies such as correctional facilities. It is Ms. Fay's opinion that persons in correctional institutions are especially vulnerable to lawsuits of this nature.

Mr. Glen Drake, representing the Montana Public Employee's Association, testified that in most cases, you are dealing with an after-the-fact issue. Mr. Drake felt this bill would allow public employees to make quicker decisions.

Mr. Jeremiah Johnson, representing the Montana Probation Officer's Association, testified that he was quite concerned with this bill.

It is his feeling that in order to have good employees making good decisions, we need to be able to provide them with a proper defense when they are simply doing their job. Mr. Johnson submitted proposed amendments to HB357 (see attached Exhibit "D") and written testimony from Jim Nugent, Missoula County Attorney (see attached Exhibit "E") in favor of HB357.

Mr. Ray Boring, a jailer from Missoula County, testified in favor of HB357. He stated that attorneys' fees in some Oregon cases had accumulated rapidly and are very difficult for most people to pay.

Mr. Darryl Meyer of Cascade County, testified in favor of HB357. Senator Mazurek requested that he be placed on record as supporting HB357.

There being no further proponents, no opponents and no questions from the Committee, the hearing was closed.

CONSIDERATION OF HOUSE BILL 807: Representative Jensen testified that HB807 is a simple bill which merely changes the time from 30 days until 90 days in which a dealer has to file a lien against a crop for seed or grain furnished in advance of payment.

There being no further proponents, no opponents and no questions from the Committee, the hearing was closed.

CONSIDERATION OF HOUSE BILL 617: Representative Underdal, sponsor of HB617, explained to the Committee that this bill provides for relief for crop dusters who have to file a lien in order to collect for their services already rendered. This bill will provide them with relief because of their expenses incurred while performing their service. Representative Underdal testified that Mr. Tom Mellott, a crop duster from Brady, Montana, also supports HB617.

There being no further proponents, no opponents and no questions from the Committee, the hearing was closed.

ACTION ON HOUSE BILL 617: Senator Galt moved that HB617 BE CONCURRED IN. His motion carried unanimously.

ACTION ON HOUSE BILL 807: Senator Galt moved that HB807 BE CONCURRED IN. His motion carried unanimously.

ACTION ON HOUSE BILL 629: Senator Berg moved that HB629 BE CONCURRED IN. His motion carried unanimously.

FURTHER CONSIDERATION OF HOUSE BILL 565: Senator Daniels had questions as to who decides what is legible and what is illegible. The Committee decided that HB565 should be amended to provide that the Clerks and Recorders must attach a note to the recorded document stating that this document is illegible and the only copy available.

ACTION ON HOUSE BILL 565: Senator Crippen moved that HB362 BE RECONSIDERED. This motion carried unanimously. Senator Shaw moved that the proposed amendments BE ADOPTED. This motion carried unanimously. Senator Mazurek moved that HB362 BE CONCURRED IN AS AMENDED. This motion carried with Senators Daniels and Shaw voting in opposition.

FURTHER CONSIDERATION OF HOUSE BILL 191: Senator Turnage questioned the tax implications of HB191. He questioned the use of the word "common." Senator Mazurek did not like the use of the word "disposition."

ACTION ON HOUSE BILL 191: Senator Daniels moved that HB191 BE TABLED. This motion carried unanimously.

ACTION ON HOUSE BILL 856: Senator Mazurek moved that the proposed amendment to HB856 BE ADOPTED. This motion carried unanimously. Senator Berg moved that HB856 BE CONCURRED IN AS AMENDED. This motion carried unanimously.

ACTION ON HOUSE BILL 880: Senator Mazurek moved that a severability clause to HB880 BE ADOPTED. This motion carried unanimously. Senator Berg moved that HB880 BE CONCURRED IN AS AMENDED. This motion carried unanimously.

ACTION ON HOUSE BILL 357: Proposed amendments to HB357 were submitted to the Committee, and Senator Mazurek moved that these amendments BE ADOPTED. This motion carried unanimously. Senator Mazurek then moved that HB357 BE CONCURRED IN AS AMENDED. This motion carried unanimously.

ACTION ON HOUSE BILL 540: Senator Shaw moved that HB540 BE TABLED. This motion failed. Senator Berg moved that the proposed amendments to HB540 BE ADOPTED. This motion carried with Senator Daniels voting in opposition. Senator Mazurek moved that HB540 BE CONCURRED IN AS AMENDED. This motion carried with Senators Galt, Shaw and Daniels voting in opposition.

ACTION ON HOUSE BILL 677: Senator Daniels moved that HB677 BE CONCURRED IN. This motion failed. Senator Daniels moved that

STANDING COMMITTEE REPORT

March 24, 1983

MR. President

We, your committee on Senate Judiciary

having had under consideration House Bill No. 357

Donaldson (Mazurek)

Respectfully report as follows: That House Bill No. 357

be amended as follows:

1. Page 2, line 24.
Following: "employer."
Insert: "If the employee is an elected state official or other employee having no supervisor, the employee shall give notice of the action to the legal officer or agency of the governmental entity defending the entity in legal actions of that type."
2. Page 3, line 17.
Following: "unless the"
Insert: "employee's"
3. Page 3, lines 18 and 19.
Strike: "upon" on line 18 through "employment" on line 19

DO PASS

Continued on page 2

March 24,

19 83

4. Page 3, line 20.

Strike: "or"

5. Page 4, line 5.

Strike: "civil suit"

Insert: "liability"

6. Page 4, line 10.

Following: "(6)"

Insert: "(b) through (d)"

7. Page 4, line 17.

Following: "based"

Insert: "constitutes oppression, fraud, or malice, or for any other reason"

8. Page 5, line 1.

Following: "If"

Insert: "no judicial determination has been made applying the exclusions provided in subsection (6), the governmental entity employer may determine whether those exclusions apply. However, if"

9. Page 5, line 9.

Following: "employee."

Insert: "The governmental entity employer has no obligation to provide a defense to the employee in a declaratory judgment action or other legal action brought against the employee by the employer under this subsection."

And, as so amended,

BE CONCURRED IN